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UNIVERSITY OF MAINE SCHOOL OF LAW
LAW

Cumberland
Legal Aid Clinic

Professor Deirdre M. Smith
[redacted]

September 12, 2014

Via electronic mail lawcourt.clerk@courts.maine.gov

Matthew Pollack
Clerk, Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04101

Re: Comments on Family Division Task Force Report

Dear Mr. Pollack:

I submit here my comments addressing the Maine Judicial Branch Family Division Task Force (FDTF) June 6, 2014 Report. I am Director and one of the faculty supervisors in Cumberland Legal Aid Clinic ("the Clinic"), a program of the University of Maine School of Law in which student attorneys, certified to practice law under court rules, provide legal representation to low-income Maine residents. The majority of the Clinic's work involves family law matters.

Overall, I agree with the conclusions and specific recommendations of the FDTF. The Report sets forth many excellent proposals, which, if implemented, would improve adjudication of family matters to the benefit of litigants (and their children), attorneys, and the courts. My comments below are directed at the FDTF's first recommendation: to expand the District Court's jurisdiction to include some guardianship and name change matters and to establish a procedure under which cases could be consolidated with a pending action concerning the same child in District Court.

As an initial matter, I am in strong agreement with the FDTF's findings and conclusions that the present system of dividing parental rights matters between the District Court (divorce, paternity, parental rights and responsibilities, and child protection) and the Probate Court (guardianship, name change, and adoption) leads to confusion and inefficiencies. Last month, I prepared and submitted to the Probate and Trust Law Advisory Commission (PATLAC) several comments regarding that commission's proposed revisions to the Maine Probate Code (MPC). My comments addressed those parts of the MPC concerning guardianship of a minor and adoption, including termination of parental rights and paternity determinations in the context of adoption petitions. As I explained in those comments, which I will not repeat in detail as I have attached a copy here, the current system of adjudicating these important and often-complex matters implicating children's best interests and their parents' constitutional rights exclusively in the under-resourced, part-time Probate Courts does a disservice to the families involved in such cases. I also noted that the "dual-court" system whereby the same child could be the subject of simultaneous, inconsistent, and uncoordinated proceedings in both the Maine District Court and

a county Probate Court operating entirely outside of the Maine Judicial Branch is especially problematic.

I agree with the basic framework proposed in the FDTF's report to address the problem of simultaneous proceedings in the District and Probate Courts by expanding the District Court's jurisdiction to cover certain parental rights matters currently under the exclusive jurisdiction of Probate Courts and by setting up a mechanism for improved communication between the District and Probate Courts regarding pending actions involving the same family. However, as I explain below, I am concerned that the statutory amendments set forth in the FDTF proposal, while an excellent step in the right direction, would not go far enough to address some of the most significant problems seen under the current system.

It is unclear whether the references to "pending," "related action," and "proceedings" in FDTF's proposed amendments to 4 M.R.S. §152 and the proposed new §251-A (pages B1–B2 of FDTF Report) would include matters in which an interim or final order has already been entered. For example, if a District Court has issued a Parental Rights & Responsibilities Judgment pursuant to 19-A M.R.S. §1653, the court may consider such matter to be no longer "pending," even though such judgment remains subject to modification or enforcement. Under the proposed language in the FDTF Report, it is not clear whether the recommendation allowing consolidation in the District Court of a guardianship petition with a "pending family matter" would apply to a petition regarding the same child filed a week after the entry of such District Court judgment. If the District Court matter is no longer considered to be "pending," thereby foreclosing the possibility of consolidation with the new guardianship matter, then the proposed statutory change will do little to eliminate the widespread problem of conflicting court orders and forum-shopping by litigants. I am also concerned that the FDTF's proposed language grants substantial discretion to the courts, particularly to the Probate Court, regarding whether to consolidate the matters while providing no guidance regarding how the courts are to exercise such discretion.

In my comments to PATLAC, I proposed a somewhat different approach (which is set out at pages 10–14 of those comments) to address the problem of simultaneous and inconsistent proceedings and orders concerning the same child. Specifically, I proposed that provisions in Titles 4 and 18-A (the MPC) be amended to establish the District Court as a child's "home court" with exclusive, continuing jurisdiction over the child once it has issued an interim or final order concerning custody or other parental rights of the child or a proceeding seeking such an order has been brought before that court. As I note in my comments, this exclusive, continuing jurisdiction would be mandatory, not discretionary, so as to eliminate any possibility of conflicting orders or simultaneous proceedings. In the time since I submitted those comments, I have had an opportunity to draft some proposed statutory language, following the same basic structure as the recommendation set forth in the FDTF's report, to provide an example of how the "home court" jurisdiction proposal could be implemented at the statutory level (such change would, of course, require several rule revisions as well). I've attached that proposed language here as an Addendum for the FDTF's consideration.

I would be happy to discuss these comments and my proposal with the FDTF or other representatives of the Maine Judicial Branch. Once again, I'd like to express my appreciation to

the FDTF for raising this important issue and for recommending jurisdictional changes to address the significant problems created by our current system.

Sincerely,

Deirdre M. Smith
Professor of Law and
Director of the Cumberland Legal Aid Clinic

Attachments:
- Addendum: Proposed legislative amendments
- August 14, 2014 Comments to PATLAC

Addendum to Comments to Family Division Task Force Report

4 M.R.S. §152. DISTRICT COURT; CIVIL JURISDICTION

…

5-A. Concurrent Jurisdiction with Probate Court. Original jurisdiction, concurrent with that of the Probate Court, of actions for guardianship, adoption, change of name, or other matters implicating custody or other parental rights brought under Title 18-A as follows:

The District Court shall have exclusive, continuing jurisdiction of any matter concerning custody or other parental rights of a child, including but not limited to adoption, divorce, parental rights and responsibilities, grandparents rights, protective custody, change of name, guardianship, paternity, termination of parental rights, protection from abuse or harassment, if:

> **(A).** an interim or final order concerning the child was entered in the District Court and remains in effect; or
>
> **(B).** proceedings seeking such an order are pending in the District Court.

The District Court presiding over any matter concerning custody or other parental rights of a minor child shall require all parties to disclose whether they have knowledge of any interim or final order then in effect concerning custody or other parental rights of such minor child, any proceeding to seek such an order, or other related actions currently filed or pending before any court of this or another state, including before a Probate Court. If the District Court becomes aware that it has exclusive jurisdiction in such a matter, it shall notify the Probate Court and take all appropriate action to facilitate a transfer of the matter from the Probate Court.

…

4 M.R.S. §251 GENERAL JURISDICTION

Each judge may take the probate of wills and grant letters testamentary or of administration on the estates of all deceased persons who, at the time of their death, where inhabitants or residents of his county or who, not being residents of the State, died leaving estate to be administered in his county, or whose estate is afterwards found therein; and has jurisdiction of all matters relating to the settlement of such estates. A probate judge ~~He~~ may grant leave to adopt children, change the names of persons, appoint guardians for minors and others according to law, and has jurisdiction as to persons under guardianship, and as to whatever else is conferred ~~on him~~ by law~~.~~, except in cases in which the District Court has exclusive, continuing jurisdiction over a child, pursuant to 4 M.R.S. §152(5-A).

4 M.R.S. §251-A. OTHER PROCEEDINGS INVOLVING PARENTAL RIGHTS; TRANSFER OF JURISDICTION TO DISTRICT COURT

(a). The Probate Court presiding over any matter involving guardianship, adoption, change of name, or other matters concerning custody or other parental rights of a minor child shall require all parties to disclose whether they have knowledge of any interim or final order then in effect

concerning custody or other parental rights of the minor child, any proceeding seeking such an order, or other related actions currently filed or pending before any court of this or another state.

(b). If in a matter before it concerning a child, a Probate Court becomes aware that the Maine District Court may have issued an interim or final order concerning the custody or other parental rights of a child, or may have before it pending proceedings seeking the same, it shall contact the District Court to determine whether the child is under the exclusive, continuing jurisdiction of the District Court pursuant to 4 M.R.S. §152(5-A). If the Probate Court confirms that the District Court has such jurisdiction, the Probate Judge shall transfer the matter to the District Court.

18-A M.R.S. §1-701. PETITION TO CHANGE NAME

(a). If a person desires to have that person's name changed, the person may petition the judge of probate in the county where the person resides. Except, however, such proceeding must be filed in or transferred to the District Court if the person is a minor and the District Court has exclusive, continuing jurisdiction regarding the minor pursuant to 4 M.R.S. §152(5-A). If the person is a minor, the person's legal custodian may petition in the person's behalf.
…

18-A M.R.S. §5-102. JURISDICTION OF SUBJECT MATTER; CONSOLIDATION OF PROCEEDINGS

(a). Subject to the exclusive jurisdiction of the District Court in matters concerning minors as provided in 4 M.R.S. §152(5-A), the Probate ~~c~~Court has ~~exclusive~~ concurrent jurisdiction over guardianship proceedings and has jurisdiction over protective proceedings to the extent provided in section 5-402.

(b). When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

18-A M.R.S. §9-103. JURISDICTION

(a). The Probate Court has ~~exclusive~~ concurrent jurisdiction over the following:

(1). Petitions for adoption;
(2). Consents and reviews of withholdings of consent by persons other than a parent
(3). Surrenders and releases;
(4). Termination of parental rights proceedings brought pursuant to section 9-204;
(5). Proceedings to determine the rights of putative fathers of children whose adoptions or surrenders and releases are pending before the Probate Court; and
(6). Reviews conducted pursuant to section 9-205.

(b). The District Court has jurisdiction to conduct hearings pursuant to section 9-205. The District Court has jurisdiction over any matter described in (a) if the proceeding concerns a child over whom the District Court has exclusive, continuing jurisdiction pursuant to 4 M.R.S. §152(5-A).

18-A M.R.S. §9-204. TERMINATION OF PARENTAL RIGHTS

(a). A petition for termination of parental rights may be brought in Probate Court in which an adoption petition is properly filed as part of that adoption petition except when ~~a child protection proceeding is pending or is subject to review by the District Court~~ the District Court has exclusive, continuing jurisdiction over the child pursuant to 4 M.R.S. §152(5-A).

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Professor Deirdre M. Smith
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August 14, 2014

via electronic mail: [redacted]

David J. Backer, Esq., Chair
Probate and Trust Law Advisory Commission
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, Maine 04101-2480

Re: Proposed Maine Probate Code Revisions

Dear David:

Thank you again for forwarding the revisions to the Maine Probate Code (MPC) proposed by the Probate and Trust Law Advisory Commission (PATLAC). I provide here my comments with respect to the provisions governing guardianship of minors and adoption/termination of parental rights (TPR) proceedings under the MPC. I am Director and one of the faculty supervisors in Cumberland Legal Aid Clinic ("the Clinic"), a program of the University of Maine School of Law in which student attorneys, certified to practice law under court rules, provide legal representation to low-income Maine residents. The Clinic has been involved with several child guardianship and TPR cases over the years in Probate Courts, primarily in Southern Maine. We have represented both petitioners and biological parents in such proceedings, often pursuant to appointment by the Probate Court.[1]

I recognize the size and complexity of the PATLAC's task of reviewing the MPC in light of new developments in the UPC. However, as I urge below, the PATLAC's review of the MPC should also consider revisions to the law to better serve Maine families in light of the problems associated with the adjudication of parental rights matters under the current MPC. I have several comments addressing specific provisions in the proposed MPC, but I will set out some broader points as an initial matter to provide background and context for my recommendations.

A. Guardianships

All guardianship of minors proceedings are under the exclusive jurisdiction of the Probate Courts pursuant to 18-A M.R.S. §5-102(a). However, such cases can arise in a wide range of contexts. One category of guardianship cases includes what are presently referred to under the MPC as "testamentary appointments," 18-A M.R.S. §5-202, where parents who had

[1] I also base my comments on several conversations about parental rights matters in Probate Court with practitioners, judges within the Maine Judicial Branch, Probate Court judges, and a scholar who advises state courts on developing and implementing family court reform.

intact parental rights are deceased and the Probate Court appoints an adult to serve as the legal guardian of the surviving minor child(ren) of such parents. Similarly, there are contexts in which a parent asks another adult, often a family member, to serve as guardian of a child because the parent's current situation (illness, etc.) limits his or her ability to parent the child. 18-A M.R.S. §5-204(b). These are generally uncontested matters (unless competing petitions are filed) which can often be handled appropriately and efficiently through the informal proceedings of Probate Court, such as as part of overall management of a deceased parent's estate. Such appointments usually grant unlimited rights to a guardian to enable the him or her to address the child's full needs, and, in the case of testamentary appointments, there is little reason to revisit the appointment itself or its scope since there are no living parents with legal standing to challenge the continuation of the appointment or the specific actions of a guardian.

In another category of guardianship cases, however, a non-parent petitions the Probate Court to obtain parental rights of a child (including primary residence and sole decision-making rights regarding the child's education, medical care, etc.) over the objection of one or both living biological parents whose parental rights are intact. A petitioner in such cases must meet the requirements of either 18-A M.R.S. §5-204(c) or (d). These cases are often acrimonious and protracted and can involve difficult issues such as allegations of abuse and neglect, abandonment, substance abuse and mental illness, incarceration, teen parents, alienation and interference with parent-child relationships, and complex and contentious family dynamics.

Imposing a guardianship over the objection of a parent pursuant to section 5-204(c), which applies to most contested guardianship matters,[2] implicates that parent's constitutional rights, and the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), has held that, absent a showing of unfitness, parents retain a fundamental liberty interest with respect to the care, custody, and control of their children. *Guardianship of Jewel*, 2010 ME 17, ¶ 12 [*Jewel I*]; *Guardianship of Jewel M.*, 2010 ME 80, ¶ 6, [*Jewel II*]; *Guardianship of Jeremiah T.*, 2009 ME 74 ¶ 27. Hence, the petitioner bears the burden of proving parental unfitness by clear and convincing evidence, and such finding is a prerequisite to imposing a guardianship over the parent's objection. 18-A M.R.S. §5-204(c); *Jewel I*, 2010 ME 17, ¶¶ 12-13; *Jeremiah T.*, 2009 ME 74, ¶ 27; *Guardianship of David C.*, 2010 ME 136, ¶ 6, 10 A.3d 684. A petitioner must also prove that his or her appointment as guardian would be in the child's best interests. 18-A M.R.S. §5-204(c). In some instances, more than one relative seeks appointment as a child's guardian, requiring a Probate Court to determine, not only if a parent is unfit, but also which (if any) of the competing petitioners should be appointed as guardian. Probate Courts also have jurisdiction to enter child support orders against biological parents in guardianship proceedings. 18-A M.R.S. §5-204. Accordingly, cases in this category of guardianship matters resemble, in all pertinent respects, family matters regarding parental rights and responsibilities that typically proceed in Maine District Court.

[2] Section 5-204(d), added to the MPC in 2005, permits appointment of a "de facto" guardian where the petitioner proves by a preponderance of the evidence that there has been a "lack of consistent participation" by the non-consenting parent or legal guardian. *See Guardianship of Kean R. IV*, 2010 ME 84, ¶ ¶ 8-10 (reversing appointment of guardian pursuant to § 5-204(d) when the grounds for such appointment were neither pleaded nor litigated). The Maine Supreme Judicial Court has not had occasion to review or apply the standards for appointment of a guardian under this provision.

B. Adoption, Termination of Parental Rights, and Paternity Proceedings

The PATLAC report did not recommend any amendments to Article IX of the MPC, which governs adoptions, because the UPC does not address adoptions. Report at 765. However, as part of the PATLAC's overall review of the MPC pursuant to its legislative charge of a "continuing study of the probate … laws of the State," 18-A M.R.S. §1-801, I would urge the PATLAC to re-examine at least some aspects of Article IX. While I have had little involvement with typical adoption cases (that is, where the parents' parental rights have already been terminated or the parents are deceased), and therefore cannot comment on the specific provisions regarding that process, the Clinic has handled a number of adoption matters that involved a contested petition for termination of a biological parent's rights under 18-A M.R.S. §9-204 (representing petitioners and parents).

The MPC vests exclusive jurisdiction in the Probate Court of most adoptions, regardless of which court issued the TPR order. 18-A M.R.S. §9-103. The only narrow exception, adopted by the Maine Legislature in 2011 and not reflected in the MPC itself, is the jurisdiction granted to the District Court to approve adoptions (and name changes) by permanency guardians in child protective proceedings, but these are quite rare. 22 M.R.S. §4038-E.

Section 9-103 also provides that the Probate Courts have exclusive jurisdiction over proceedings brought pursuant to §9-204, under which an adoption petitioner can ask the Probate Court terminate the parental rights of a nonconsenting biological parent to clear the way for the adoption. The rights at stake for such parents are even more substantial than those implicated in guardianship proceedings because the parent-child legal relationship can be severed completely and permanently.18-A M.R.S. §9-204. Although the *result* of such proceedings can be the same as a TPR order in a District Court Title 22 child protection proceeding, the course of proceedings and protections afforded to the biological parents are far different.[3] Title 22 cases are generally initiated by the Maine Department of Health and Human Services (DHHS or "the Department") after a child abuse or neglect investigation, the court must establish a family reunification plan to be implemented by DHHS, and it may allow a TPR petition to proceed to hearing only after the State has demonstrated that such reunification efforts should be abandoned. 22 M.R.S. §4041.

By contrast, TPR proceedings in Probate Court (much like contested guardianship cases) are essentially "private" child protection cases; the Department is not involved.[4] Further, nothing in the Probate Code (or those sections of Title 22 incorporated by reference) authorizes the Probate Court to order the Department (or petitioners) to provide services to the child or parents or to require attempts at reunification as a prerequisite to the TPR. *In re Adoption of L.E.*, 2012 ME 127, ¶ 13. Rather, the petitioners (who are often the child's other biological parent joined by

[3] Although the Protective Custody statutory scheme permits a Probate Court to issue a preliminary protection order, 22 M.R.S. §4031(B), the child protective petition itself must be filed and adjudicated in the District Court.

[4] The Department may have some involvement with a family prior to the filing of a guardianship petition, including encouraging a relative to file for guardianship as part of a "safety plan" for the child based upon the Department's concerns regarding a parent's fitness. But the Department is not a party to the guardianship case nor does it remain involved with the family to provide services such as supervision of visitations, transportation, housing assistance, parenting support or any of the other services that it may be required to provide the family in a child protection case to preserve the family relationship and to facilitate and support reunification. 22 M.R.S. §4041(1-A).

his or her new spouse or partner) need only offer evidence to support a finding that the grounds for termination under 22 M.R.S. §4055[5] have been met to obtain an order permanently severing the a parent's legal relationship with the child. Given the significant problems, outlined below, seen with the adjudication of contested family matters in Probate Court, there is a substantial risk that a parent-child relationship could be severed in a process that does not fully protect parents' rights, meet the best interests of the child at issue, or serve broader goals of preserving families, such as those set out in 22 M.R.S. §4003(3).[6]

The MPC provisions in Article IX regarding paternity rights in adoption matters where no prior court order established such rights should also undergo significant review, revision, and clarification. The Law Court's opinion in *In re Tobias D.*, 2012 ME 45, requires Probate Courts to interpret and apply the language of 18-A M.R.S. §9-201 in a manner far different from the statute's plain language, apparently to ensure that the provision is not unconstitutional in its application.[7] It would be preferable and appropriate to have the language of the statute itself reflect the procedure and standards to be applied in such matters.

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[5] That statute permits a court to terminate a parent's rights without their consent if:

> **(2)** The court finds, based on clear and convincing evidence, that:
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> **(a)** Termination is in the best interest of the child; and
>
> **(b)** Either:
>
> > **(i)** The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs;
> >
> > **(ii)** The parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs;
> >
> > **(iii)** The child has been abandoned; or
> >
> > **(iv)** The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041.

22 M.R.S. § 4055.

[6] Hon. Joseph Mazziotti, the Cumberland County Probate Judge, outlined many of the challenges facing Probate Courts in these TPR cases in his September 27, 2010, letter to the Maine Legislature's Task Force on Kinship Families (availabile at http://www maine.gov/legis/opla/JudgeMazziottiRespon.pdf). He stated that "more specific standards/guidelines to apply in a given situation would assist the probate court."

[7] For example, the language of the statute suggests that, if the Probate Court finds that a putative father is the biological father of the child, it must then make specific findings about his ability to take responsibility for the child before it may "declare the putative father the child's parent with all the attendant rights and responsibilities." 18-A M.R.S. §9-201(i). If the father does not timely invoke the process to "establish" his parental rights, or he has not met the requirements of §902(i) (*i.e*. the court does not make the aforementioned specific findings), the statute provides that the court must rule the he has "no parental rights" and his consent (or surrender and release) is not required for the adoption. 18-A M.R.S. §9-201(j). Notwithstanding such language, the Law Court held in *Tobias D.* that, if a man is found to be the biological father but the petitioners nonetheless wish to proceed with the adoption, the matter should proceed as a TPR determination (rather than one in which a biological father must prove he's

C. The Probate Court as a "Family Court"

As outlined above, there are several types of contested proceedings under the MPC which are unquestionably "family law" matters in terms of the parties, issues, and potential outcomes.[8] However, it has been our experience with contested guardianship and TPR/adoption matters that the families involved are not well served by the current MPC provisions governing these matters. The MPC provides little guidance or clear authority to the judges overseeing these difficult cases, and, at the same time, vests exclusive jurisdiction of these matters in a system of part-time, independent Probate Courts that is inadequate to meet the needs of the litigants and the children involved. This section will outline some of the specific problems we've seen.

The Probate Courts, which have very limited resources, are ill-equipped to handle the protracted nature of these disputes, which often require multiple testimonial hearings, including those for modification or enforcement of prior court orders. Circumstances may necessitate expeditious resolutions of specific disputes to protect a child's best interests and/or a litigant's rights. Probate Judges are part-time, and each Probate Court has only one judge to serve the entire county. Thus, scheduling hearings (particularly contested testimonial proceedings requiring several hours of court time) is very challenging, often leading to delays or interruptions in proceedings.[9] A Probate Court's failure to timely process minor guardianship cases led to the reprimand of the Probate Judge for violation of Judicial Canon 3(B)(8). *In The Matter of Lyman L. Holmes*, 2011 ME 119. The Maine Supreme Judicial Court found that the Probate Judge was well-intentioned, and that his "failure to effectively manage his caseload was undoubtedly aggravated by the substantial growth of the [] Probate Court's family law docket in recent years." *Id.* at 3 (quoting Justice Jon Levy's factual findings). The Court noted that a "heavier docket requires judicial practices tailored to the time-sensitive needs of children and families." *Id.* However, there have been no systemic or structural changes in the Maine Probate Courts to allow judges to tailor their practices to these acute needs.

It is of little surprise that the Probate Courts' contested guardianship caseloads are increasing. Such petitions often reflect incidence of problems affecting Maine families such as substance abuse, mental illness, domestic violence, poverty, homelessness, teen pregnancy, unemployment, and incarceration.[10] However, unlike testamentary guardianships, these

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entitled to be *granted* parental rights), and the Probate Court must therefore follow the requirements of 22 M.R.S. §4055, which governs other contested TPR determinations in conjunction with adoptions under §9-204.

[8] *See* Hon. Robert M.A. Nadeau, "Maine's Probate Courts: The Other Family Law," 18 *Me. B.J.* 32 (2003).

[9] For example, the trial days in a single contested matter may be spread across several weeks because the Probate Court cannot schedule a matter for consecutive days due to the limited availability of the Probate Judge**.** The delays in scheduling guardianship matters can be contrasted with child protection proceedings, which must follow 22 M.R.S. §4035(4-A), requiring the District Court to issue a jeopardy order within 120 days of the filing of a child protection petition.

[10] There has been a corresponding increase in child protection matters filed in District Court, and the burdens on that process and DHHS has had a spillover effect resulting in more guardianship petitions in Probate Court. Indeed, as noted earlier, one strategy frequently implemented by DHHS as part of a "safety plan" in child welfare investigations is to identify a non-parent family member to provide care for a child and then to encourage such relative to seek guardianship of the child. With the guardianship order in place, DHHS then closes its file on the

situations, while acute, may nonetheless be temporary, and therefore there is every reason to try to preserve the parent-child relationship. Such scenarios suggest a need for more flexibility and customization of guardianship orders, far beyond the typical form "letters of appointment" issued by most Probate Courts or short-term (maximum of six months) temporary guardianships, as well as a system that can accommodate multiple court appearances as needed and periodic reviews to address new conditions and circumstances as they arise. The enactment in 2011 of 18-A M.R.S. §5-213, which authorizes Probate Courts to enter an order for "transitional arrangements for minor" as part of a guardianship matter, was an excellent addition to the MPC. However, far more changes to the MPC are needed to address the realities faced by the families involved in these complex cases.

In contrast to the Probate Courts' limited authority in guardianship and TPR matters under the MPC, the statutes and rules governing family matters in District Court provide a far greater range of options to best address the interests of the children at issue, such as appointing a guardian *ad litem* (GAL), issuing and modifying interim relief, requiring participation in parent education programs and counseling, setting progressive visitation schedules, crafting reunification plans, and other targeted measures. Most proceedings involving children are managed either by Family Law Magistrates in the Judicial Branch's Family Division, Me. R. Civ. P. 100, 110A, or pursuant to a specific statutory framework and timelines for such matters, such as 22 M.R.S. §4031 *et seq.*[11] The operating assumptions in these family law matters reflect the broader policy determination that a child is best served by maintaining a relationship with his or her parents unless compelling circumstances dictate otherwise and that such relationship should not be severed until all possible measures have been exhausted (or the parent fails to engage in such measures). *See* 19-A M.R.S. §1653(1)(C); 22 M.R.S. §4003(3); *In re Thomas D.*, 2004 ME 104. This approach is also consistent with the recognition of parental rights as fundamental constitutional rights.

The Maine Probate Courts are not part of the Maine Judicial Branch, including the Family Division. Accordingly, there is limited opportunity for development of uniform (or at least consistent) procedures among the various Probate Courts. It is well-known among practitioners that the practices of different Probate Courts vary greatly. This means that, other than the appellate jurisdiction of the Maine Supreme Judicial Court or the Committee on Judicial Disability and Responsibility, each of which can only review specific errors or complaints on a case-by-case basis, there is no oversight of the Probate Courts. Indeed, there is no "Probate Court

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child. *See* University of Maine Center on Aging, *Supporting Maine's Families: Recommendations from Maine's Relatives as Parents Project* (January 2005) at 3, 7 (describing factors leading to increasing number of children being raised by grandparents and other non-parent relatives and how guardianships save the State money) (http://umcoa.siteturbine.com/uploaded_files/mainecenteronaging.umaine.edu/files/RAPPWhitePaper08.pdf).

[11] The District Court can also order the parties to participate in mediation with a professional mediator hired, trained, and supervised by the Maine Judicial Branch's Court Alternative Dispute Resolution Services (CADRES). There is no equivalent service for litigants in the Probate Courts. We have been fortunate to work with pro bono mediators in a few of our contested guardianship cases who provided mediation services in response to requests from either our office or the Probate Court. The Maine Legislature's Task Force on Kinship Families, in its November 2010 Report, suggested that increased availability of mediation services in guardianship matters would be beneficial to the Probate Court and families involved. TFKF Report at 8 (http://www maine.gov/legis/opla/kinshiprpt.pdf).

system" which can develop and implement policy and best practices and coordinate the work of all of the Probate Courts as does the Maine Judicial Branch for the courts within its system.[12]

One of the most serious consequences of the MPC's assignment of guardianship and TPR/adoption matters to the sole jurisdiction of the Probate Courts is that such cases can be complicated by the occurrence of separate, simultaneous proceedings in the District Court involving the same child. *See, e.g.*, *Guardianship of Gabriel I.K. Johnson ("In re: Gabriel")*, 2014 ME 104; *Jewel II*, 2010 ME 80; *Jewel I*, 2010 ME 17. My review of national surveys of court jurisdiction indicates that Maine may be unique or among only a very small number of states that have family law jurisdiction spread out between, not only different courts,[13] but separate court systems.[14] Maine law is unclear regarding which proceedings take precedence or how conflicting orders are to be interpreted and enforced, *Marin v. Marin*, 797 A.2d 1265, 1267 n.1 (Me. 2002), and Probate and District Courts are inconsistent regarding communication about pending matters. *In re: Gabriel*, 2014 ME 104, at ¶¶ 15-17. Even if courts do share information, Maine law provides no guidance to courts about how to proceed in a way that protects the parties' rights and the child's interests and ensures that the matter is handled in an efficient and effective way.[15]

The District Court and Probate Courts may, in their respective family law cases involving the same child, engage in fact finding and/or may appoint Guardians ad Litem to conduct an investigation and provide recommendations. However, separate proceedings render it very difficult if not impossible for the other court to build on (and issue orders consistent with) prior knowledge acquired by the court and GAL about the family and the course of proceedings.

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[12] There is an informal organization called the "Probate Judges Assembly," but it has no responsibility for setting probate court policy or procedure. The Maine Supreme Judicial Court's Advisory Committee on Probate Rules oversees revisions to the Maine Rules of Probate Procedure. However, such rules are fairly general and much actual "procedure" is set by individual Probate Courts through local practice, not the promulgation of rules.

[13] For example, in 2003 (the year of the most recent survey by the National Center for State Courts), Maine was one of 13 states in which guardianships of minors were handled in a Probate Court, but it was one of only two states in which the Probate Court had the exclusive jurisdiction over such cases. National Center for State Courts, *National Survey of State Court Jurisdictio*n (2003) (http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/173). The other state is Connecticut, whose probate courts have more extensive jurisdiction over a range of family matters, including child welfare and paternity cases, than Maine's probate courts (http://www.ctprobate.gov/Pages/ChildrensMatters.aspx).

[14] National College of Probate Judges, *Table of Probate Jurisdiction* (2014) ("In most states, probate subject matter jurisdiction is vested in the courts of general trial jurisdiction as a division within the courts.") (http://ncpj.org/about-ncpj/state-courts-having-probate-jurisdiction/). Some states have designated probate courts, but such courts are usually part of the state judicial branch. Those that are separate from the state court system have far more limited jurisdiction than do Maine's Probate Courts (*i.e.* estate or adult guardianship/conservatorship matters). *Id.*

[15] One of the few types of family law matters on which the Probate and District Courts do have concurrent jurisdiction is with respect to child support. Probate Courts can enter child support orders in guardianship matters, eliminating the need for the guardian or DHHS to seek an order in District Court. 18-A M.R.S. § 5-204. The efficiencies created in these cases serve as an example of the benefits of resolving all legal matters concerning parental rights and responsibilities in a single proceeding before one court.

Similarly, contested name change petitions involving minor children, which are in the exclusive jurisdiction of Probate Courts, can be rendered more complex by the fact that the authority of a parent to seek such name change is controlled by the rights granted under a District Court order, yet the District Court has no jurisdiction to order a child's name to be changed as part of a parental rights proceeding. 18-A M.R.S. §1-701(a); *In re Kidder*, 541 A.2d 630 (1988).[16] Finally, while a District Court judge, as well as a GAL, may have become very familiar with (and a familiar face to) a child involved in a child protection proceeding, the adoption of that child must proceed in a new case before a judge who has no prior knowledge of the child, the petitioners (who may be foster parents), or the context for the adoption, which can significantly delay the progress of the adoption.

A related problem we have encountered on several occasions in recent years is when the parties in a contested guardianship or TPR/adoption case reach an agreement that involves modification to an existing parental rights order in a District Court family matter. In each instance where we reached such an agreement, the parties had to first request that the Probate Court stay the proceedings and then file a new post-judgment matter in the District Court (meeting all of the filing and service requirements) to move the District Court to make the modification to the District Court Order. This is in sharp contrast with, for example, our experience in resolving Protection from Abuse Proceedings; if we reach an agreement to amend a family matter order in lieu of (or in addition to) a PFA Order, it is quite simple to have the District Court amend the family matter order on the same day that the parties are in court and reach the agreement.[17] In short, the current provisions of the MPC granting exclusive jurisdiction to the Probate Courts of certain family matters leads to confusion (particularly for unrepresented parties), inefficiencies, conflicting orders concerning children's best interests, all of which can feed intra-family conflict and cause delays in proceedings.

The limited resources and informal practices of the Probate Court can also lead to inadequate due process for litigants in contested parental rights matters. Probate Courts do not customarily record proceedings, even in the case of contested testimonial hearings where there is a request by one of the parties. [18] *See, e.g.*, *In re: Gabriel*, 2014 ME at ¶10. Creating a record of proceedings is not only a core due process value,[19] it is also a best practice.[20] Having an

[16] By contrast, the District Court does have jurisdiction to order a name change for one or both divorcing spouses as part of a divorce judgment pursuant to 19-A M.R.S. § 1051, presumably for reasons of efficiency.

[17] Similarly, a District Court judge presiding over a protective custody proceeding may enter an order regarding parental rights pursuant to 19-A M.R.S. § 1653, which can enable the parties to resolve the protective custody case through an amendment to a family matters order. 22 M.R.S. §4036(1-A).

[18] The Law Court has held that TPRs in adoption cases are "child protection" proceedings, and therefore must be recorded pursuant to 22 M.R.S. § 4007(1); *In re Dylan B.*, 2001 ME 31, 766 A.2d 577, 578 (vacating TPR order against mother and remanding where Probate Court failed to record contested TPR hearing).

[19] *See M.L.B. v. S.L.J.*, 519 U.S. 102, 106, 120-123, 125-126 (1996); *Gorman v. University of Rhode Island*, 646 F. Supp. 799, 808 (D.R.I.1986), *rev'd* in part on other grounds 837 F.2d 7 (1st Cir. 1988).

[20] *See* National Probate Court Standards, Standard 1.3.E (2012) ("Records of all relevant probate court decisions and proceedings should be accurately maintained and securely preserved.).

accurate record is essential for reviewing a court's actions on appeal,[21] and it can also be important for promptly documenting an agreement reached by parties at the courthouse by entering it "on the record" or for accurately capturing the specific terms of a bench ruling. The Maine Supreme Judicial Court has identified testamentary hearings involving the guardianship of children as a type of proceeding that a court must routinely record, regardless of any request of the parties, Me. Admin. Order JB-12-1 (as amended by A. 11-13); however, most Probate Courts do not follow this requirement and the Law Court has not clarified its expectations regarding implementation of the rule.[22] The burden of arrangements for making one's own recording is particularly severe on unrepresented and/or low-income parties.[23]

Family law proceedings in Probate Court may be further complicated by the fact that sitting Probate Judges (and candidates for such office) are permitted under both the MPC and the Maine Judicial Canon, Part II, Section B (1)(b), to practice law in both the Probate and District Courts, giving rise to a range of actual or potential conflicts. For example, in a contested guardianship case in which we represented a biological parent, the counsel for the petitioners unseated the Probate Judge in an election during the course of the proceedings. Because there is only one judge in each county, our case was transferred to another county, requiring additional travel for all of the parties (including our low-income client), their witnesses, and their counsel. While the delay in our proceedings from the transfer was fairly minimal, there is certainly the potential for longer delays in any case transfer. The transfer also meant that all of the prior judge's knowledge of the case was no longer a part of the proceedings. The opposing counsel, now a sitting probate judge, remained counsel for the petitioners until the case went to a hearing (and then represented the other biological parent in a parallel District Court proceeding involving the same child). To be clear, I am *not* asserting any actual unethical or improper conduct by anyone in this example. Rather, these events demonstrate the added inconvenience, disruption, cost, and an appearance of impropriety that can result from the exemption created for Probate Judges from the Judicial Canon's prohibition on practice by judges, combined with the current Probate Court structure.

I want to emphasize that, by providing the above description of the range of problems I have seen and learned of from others, I am not suggesting that our Probate Judges are not qualified, dedicated, ethical jurists. To the contrary, I have encountered Probate Judges who, despite their part-time status, low pay, inadequate resources, and poor guidance from the

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[21] *See Guardianship of Helen F.*, 2013 ME 18, ¶¶ 5–7 (vacating adult guardianship order where Probate Court did not make recording of the proceedings and the judge's inability to recall the evidence presented prevented the appellant from submitting an adequate statement of the evidence pursuant to M.R. App. P. 5(d)). *See also In re: Gabriel*, 2014 ME 104, ¶ 17 n. 6 (noting the difficulty of determining on appeal what proceedings took place when there is no recording).

[22] In the recent opinion in *In re: Gabriel*, 2014 ME 104, the Law Court noted that the Administrative Order appears to require such recordings but declined to apply the AO in that case or to clarify its requirements. *Id.* at ¶18 n.7.

[23] As noted in the *Gabriel* opinion (a case in which the Clinic represented the appellant at both the trial and appellate levels), a Probate Court did not permit a party to make her own recording of a contested guardianship hearing after the court refused to record the proceedings. The Law Court declined to reverse the judgment due to such action but did note in its opinion: "Nevertheless, it is preferable in every instance for a trial court to allow a party to record a hearing if the court is unwilling or unable to do so." *In re: Gabriel*, 2014 ME 104, at ¶ 18.

applicable statutes, do exceptional jobs with very difficult cases. These judges devise creative solutions to family problems and are clearly committed both to administering their courts in a fair and just manner and to serving the best interests of all litigants who come before them, especially the children at the center of these disputes. However, even the most consciousness and hard-working Probate Judge must nonetheless operate within limitations created by the MPC, the Probate Court structure, and the split-jurisdiction approach to family matters. My comments, therefore, address only those limitations, not the judges who must contend with them.

D. Specific Comments and Recommendations

With those general observations in mind, I offer the following specific comments and recommendations.

1. Expand the Jurisdiction of District Court and Establish "Home Court" Jurisdiction.

In light of all of the difficulties of simultaneous and conflicting orders and proceedings involving the same child described above, I offer a suggestion to amend the MPC and related statutes so that all matters implicating parental rights regarding a child are adjudicated before the same court. First, 4 M.R.S.§152 (regarding District Court jurisdiction), as well as the MPC at §1-701, §5-102, §5-204, §9-103, §9-201, and §9-204, should be amended to provide concurrent jurisdiction in District Court for guardianship of a minor, change of a minor's name, and adoption (including terminations of parental rights pursuant to 18-A M.R.S. §§9-201 and 9-204). A new provision should be enacted to require that, if the child is already the subject of an interim or final order in effect that resulted from a Parental Rights and Responsibilities, Divorce, Grandparents Rights, Child Protection, Paternity, Protection from Abuse, or Protection from Harassment matter, or if there is a pending proceeding in Maine District Court to seek such order, any guardianship, name change, or adoption/TPR matter must be filed in and addressed in the District Court (or transferred to that court if the initial filings was in the Probate Court), and preferably the court location where such order, judgment, or proceeding occurred.

This reform would establish a District Court as the "home court" having exclusive, continuing jurisdiction over the child, including modification and enforcement of all orders regarding that child, if it has already issued, or is presently overseeing litigation seeking, an order concerning parent rights of that child.[24] A guardianship or adoption/TPR petition would essentially be treated as a petition to the court seeking modification (or termination) of an existing order or a cross-petition for a different order (in the case of pending proceedings). Where there is a question regarding whether a case should proceed in District or Probate Court,

[24] This proposal is based on the basic objectives and concepts set forth in the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), codified in Maine law at 19-A M.R.S. §§1731–1783. That Act provides that, if a court in one state has issued a "child custody determination," such court thereafter has "exclusive, continuing jurisdiction" over that determination (including any modification of such order) unless the parties no longer reside in or have significant connections with such state. 19-A M.R.S. §§ 1746, 1747. The law also precludes simultaneous child custody proceedings in different states and sets forth procedures and standards for determining which state may exercise jurisdiction over the matter. 19-A M.R.S. § 1750.

the statute should require communication between the courts to resolve the dispute, and, where appropriate, determine the process for transferring the matter to another court.[25]

There are several significant benefits to a system requiring consolidation of all proceedings involving a child in one court. It eliminates the confusion, added costs, re-litigation, re-education of a new judge or GAL, and conflicts described above. It would enhance the efficient and timely disposition of family matters. It would provide more flexibility and opportunities for creative solutions to address a child's needs while preserving their relationships with parents who still have parental rights. It would ensure that the parties and court are aware of what orders are in effect and the procedural status of the case. It would end the practice by some litigants of "court-shopping" or otherwise using the present two-court system to increase delay, cost, or inconvenience to another party. It would facilitate the participation of attorneys and GALs in the matter. And all of these results would benefit the courts as well as the parties.

This recommendation is based, not only upon my observation of the significant problems created by concurrent orders and proceedings in the District and Probate Courts, but also on the broader policy goals of minimizing the adverse impact of litigation on children and families.[26] Extensive research has documented the effects, especially for those in poverty, of fractured and protracted litigation regarding family issues. And, based upon those findings, many states are establishing comprehensive jurisdiction in specific family courts, including Unified Family Courts, to ensure that that proceedings can be as effective and efficient as possible and to minimize the amount of time a family must appear in court to resolve a dispute.[27] The few provisions in Maine law that presently permit consolidation of certain kinds of parental rights proceedings reflect these same objectives.[28] And the importance of clarity and consistently is a

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[25] The UCCJEA includes provisions requiring or authorizing communications between courts of different states to resolve jurisdiction questions. *See, e.g.*, 19-A M.R.S. §§1748(4), 1750(2). In *In re: Gabriel*, 2014 ME 104, which involved a simultaneous and conflicting proceedings in the Probate and District Courts, the Law Court explained the importance of communication between courts with pending proceedings involving the same child. *Id.* at ¶¶16–17.

[26] *See, e.g.*, 19-A M.R.S. § 1653(1)(A) ("The Legislature finds and declares as public policy that encouraging mediated resolutions of disputes between parents is in the best interest of minor children.").

[27] Scholars and others working on court reform efforts have documented the problems of "fragmentation" in family law jurisdiction and developed the "Unified Family Court" model as a means to reduce such problems. *See, e.g.*, Barbara A. Babb, "Unified Family Courts: An Interdisciplinary Framework and Problem-Solving Approach," in *Problem-Solving Courts: Social Science and Legal Perspectives* (Richard L. Weiner & Eva M. Brank eds.) 76 (2013); "Developments in the Law – Unified Family Courts and the Child Protection Dilemma," 116 *Harv. L. Rev.* 2099 (2003) (noting UFC advocates' view, consistent with "family systems theory," that "traditional courts' 'illogical compartmentalization' of a family's legal problems is more than a breach of best practices: fragmented resolutions result in substantive injustice to the family and may even amplify the damage that family conflicts cause."); Catherine Ross, "The Failure of Fragmentation: The Promise of Unified Family Courts," 32 *Fam. L. Q.* 3 (1998). In addition, several state courts adopted aspects of the UFC model to provide comprehensive subject matter jurisdiction over family law matters in a single court. Barbara A. Babb, "Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems," 46 *Fam. Ct. Rev.* 230 (2008). I would be happy to supply additional information on this research and court reform developments in other states.

[28] For example, 22 M.R.S. §4031(3) permits consolidation of protective custody proceedings with "another pending proceeding in which child custody is an issue." I have seen District Court judges consolidate Protection from Abuse matters with pending divorce or parental rights and responsibilities cases involving the same child. The District Court may oversee the adoption of a child by a permanency guardian. 22 M.R.S. §4038-E.

significant policy reason behind the Uniform Child Custody Jurisdiction and Enforcement Act, adopted by Maine and every other state in the U.S., which serves as the primary inspiration for this proposal.[29]

I note that the PATLAC's report recommends that the MPC be amended to incorporate by reference the definition of "best interests of the child" set forth in 19-A M.R.S. §1653(3). Report at 533. This is a positive step as, presently, the MPC has a different "best interests" definition from that found in other family law statutes. *Compare* 18-A M.R.S. §5-101(1-A) *with* 19-A M.R.S. §1653(3). However, such amendment alone would not ensure that all "best interests" determinations regarding the same child are reached in the most efficient and consistent manner.

My impressions and experiences are consistent with the findings of the Maine Judicial Branch's Family Division Task Force's Report, issued on June 6, 2014, regarding the dual jurisdiction system for family matters. The Task Force noted, based upon it information gathered at a series of public hearings and from solicitation of public comments: "Litigants and attorneys expressed dissatisfaction with the disconnect between the various district courts and the county probate courts. Overall, the perception is that when families are required to appear before two completely separate and disconnected legal venues, the result is confusion and waste of precious resources."[30] Such finding, the Task Force reported, led to a discussion among the Task Force members regarding whether "the best result would be to consolidate the county probate courts into the Judicial Branch." Task Force Report at 7.

However, "given the mammoth undertaking that would create," the Task Force made a more modest recommendation: that the District Court's jurisdiction be expanded to include guardianships and name changes in paternity matters to allow consolidation of such proceedings with other family matters in the District Court involving the child. *Id.* at 7–8. The Task Force explained the rationale for such recommendation as follows:

> Creating an avenue for the parties and/or District Court to request all family matters be consolidated before the District Court would, in great part, minimize the confusion created by dueling legal forums, decrease intentional delay by one or more of the parties, and conserve family financial resources.

Id. at 7. The Task Force's recommendation would include statutory and rule changes to effectuate such consolidated proceedings, as well as to encourage cooperation between the District and Probate Courts regarding family matters and to require parties in District Court matters to disclose any Probate Court matters involving the child. *Id*. at 7-8, Appendix B1–B2,

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[29] *See* Uniform Comment published with 19-A M.R.S. § 1731 regarding "statement of purposes" of UCCJEA, which include: avoiding "jurisdictional conflict and competition"; discouraging use of multiple states for "continuing controversies over children"; avoiding relitigation of issues decided in other courts, and facilitating enforcement of existing orders.

[30] Maine Judicial Branch, Family Division Task Force 2013, *Report to the Justices of the Maine Supreme Judicial Cour*t 6 (June 6, 2014) (http://www.courts.maine.gov/maine_courts/supreme/comment/fdtf/ftdf_notice.shtml).

C5. I largely agree with such recommendation as a good start, but I am concerned that the proposed revision will not sufficiently reduce the incidence of the problems discussed above.[31]

The problems created by spreading family law matters between the District and Probate Courts are not new, and the Family Division Task Force was not the first group to document them. In a 1985 report to the Maine Judicial Council, the "Committee for the Court Structure in Relation to Probate Courts and Family Matters" (also known as the "Cotter Report" because the Committee was chaired by William R. Cotter) documented the impact on children and families of having guardianship and adoption matters proceed exclusively in Probate Courts. To address such problems, the Committee recommended that the Legislature transfer the Probate Court's jurisdiction over all family matters to the state courts. Cotter Report at 7.

Even where there is no risk of conflicting orders or simultaneous proceedings, there is still the question of whether Probate Courts have sufficient staff, court time, and resources to adjudicate contested family law matters. I would also recommend that PATLAC propose amending the MPC and related provisions to permit one or both parties (or the Probate Court on its own motion) in a guardianship or TPR hearing to remove the matter to District Court, even if there is no court order in effect issued by or proceeding in the District Court.[32]

My proposal would not require any change for adoption proceedings where the parents have died or provided consent through a private arrangement. Similarly, such requirement likely will not have an impact on parent-initiated or testamentary guardianships since there would not be an parental rights and responsibilities order *in effect* at time of petition. However, I would suggest that the PATLAC consider whether to expand the District Court's adoption jurisdiction to include all those involving children who were the subject of a child protection or other parental rights proceeding in that court (not just in the permanency guardianship context), where the familiarity of the judge, the Department, and GAL would be beneficial to the adoption context.

I should emphasize that I have sketched out here only some very broad ideas for amending the MPC to address the problems described herein. I understand that implementation would require revisions to several laws and related rules, as well as a study of the costs and impact on both court systems of such change to determine the best process for such

[31] First, it is unclear whether the reference to "pending," "related action," and "proceedings" in the proposed amendments to 4 M.R.S. §152 and the proposed new §251-A includes all matters in which an interim or final order has already been entered. For example, if a District Court has issued a Parental Rights & Responsibilities final judgment pursuant to 19-A M.R.S. §1653, the court may consider such matter to be "concluded," even though such judgment remains subject to modification or enforcement. *See* 19-A M.R.S. §1657. It is not clear, however, whether the Task Force's recommendation allowing consolidation in the District Court would apply to a guardianship petition regarding the same child filed a week (or more) after the entry of such judgment. Also, the Task Force's proposed language grants substantial discretion to the courts, particularly the Probate Court, regarding whether to consolidate the matters.

[32] There is a provision in the MPC regarding removal of matters to Superior Court for jury trials, but that does not provide a mechanism for removal of family matters (which cannot be decided by a jury) nor does it expand the jurisdiction of the District Court to hear any Probate Court matters. 18-A M.R.S. §1-306.

implementation.[33] However, the PATLAC, like the Family Division Task Force, is in an ideal position to evaluate proposals and to make recommendations to put a reform process into motion. I strongly urge that it do so, for the benefit of Maine children and families, as well as for the administration of justice in Maine.

Because this suggestion, if implemented, would implicate the District Court's jurisdiction and caseload, I have copied here District Court Judge Wayne Douglas in his capacity as the Chair of the Family Law Advisory Commission.

Summary of Recommendation: Amend 4 M.R.S. §152 and other provisions as necessary to expand the jurisdiction of the District Court to include name change of a minor, guardianship of a minor, and adoption/TPR proceedings under article IX of the MPC (including proceedings brought under 18-A M.R.S. §9-201 and 9-204), and amend 18-A M.R.S. §1-701, §5-102, §5-204, §9-103, §9-201, and §9-204 as necessary to be consistent with extension of jurisdiction of such matters to the District Court. Enact a new statutory provision to provide that District Court shall have exclusive, continuing jurisdiction over the rights and responsibilities of parents and others regarding a child once such child is the subject of a court order then in effect or a pending complaint, motion, or petition, seeking an order with respect to the child. Such provision would further require that, where the District Court has exclusive, continuing jurisdiction of a child, any petitions (1) to change a minor's name; (2) for appointment of a guardian of a minor, or (3) adoption (that will either will require a proceeding to terminate parental rights or is being filed after a TPR in District Court) must be filed and adjudicated in the District Court. The proposed new 18-A M.R.S. §5-107, "Transfer of Jurisdiction," (see PATLAC Report at 544–45) may be an appropriate place to make amendments reflecting the above recommendation to facilitate transfer of a case that has been filed in the Probate Court but must proceed in the District Court. If the proposed new 18-A M.R.S. §5-102 is adopted, Report at 533, the definition of "court" in guardianship of minor matters should be amended to include the District Court.

As I noted earlier, not only are our Probate Courts acutely under-resourced in terms of having the necessary funding, staff, and court time required to adjudicate parental rights cases, they also must operate within the current language of the MPC, which provides little by way of the standards, authority, and flexibility that a court needs when attempted to meet the needs of children in volatile, complex, and contentious situations. Accordingly, the guardianship and TPR/adoption provisions within the MPC are in need of substantial revision to reflect the reality of the cases the courts address today and also the development of the case law regarding the constitutional rights of parents. Recommendations 2 through 5 below address those areas of the MPC in need of such revision.

[33] One consideration, for example, is the appointment of counsel for indigent litigants where required by statute. In Probate Courts, such appointments are made by individual courts and paid out of the court's budget. If such appointments were to occur in District Court, it would likely need to be through the Maine Commission on Indigent Legal Services, which oversees appointment of counsel in child protection proceedings, as well as in criminal and civil commitment matters. 4 M.R.S. §1801.

2. Requirements for Appointment of a Guardian of a Minor.

a. *Standard for Appointment*. The PATLAC has proposed several revisions to §5-204 that would follow the UPC while preserving some aspects of Maine law. The proposal would substantially change the language of the standard for appointment of a guardian where a parent does not consent to that appointment. However, the Proposed Comments are essentially silent on why such change is recommended. While the proposed language at page 570 is an improvement in terms of its simplicity (i.e. "the parents are unwilling or unable to exercise their parental rights"), it is far too vague to provide courts with specific guidance to ensure that they continue to impose a high standard on petitioners so that parents' rights and children's needs are fully protected. The proposed amendment also eliminates the "clear and convincing evidence" standard, which the Law Court has held to be a constitutional requirement, as noted above. It also makes no mention of a required specific finding, in addition to parental unfitness, that appointment of the petitioner as guardian would be in a child's best interest.[34] These requirements, presently in §5-204, should be retained, or other language should be proposed to make it clear that the amendments are not intended to reverse any of the Supreme Judicial Court's holdings and guidance regarding the high burden on petitioners seeking appointment as guardians over the objections of parents. There is also little guidance either under the current or proposed MPC for courts faced with competing petitions for guardianship of the same child.

b. *Temporary Guardianships*. Both the current and proposed MPC language sets a fixed limit for temporary guardianships at 6 months. 18-A M.R.S. §5-207(c) (proposed for new §5-204(d)). In some instances, the family would be better served by a longer temporary guardianship (such as to implement a transition plan under §5-213). In the recent opinion In *In re: Gabriel*, 2014 ME 104, the Law Court noted the restricted authority granted to Probate Courts under the MPC with respect to temporary guardianships. The Court interpreted the present statute to preclude a court from using "serial temporary guardianships as stop-gap measures while the petition for permanent guardianship is proceeding." *Id.* at ¶17 n.6. However, we have seen several cases in which Probate Courts interpret the provision to provide courts flexibility to make successive appointments of temporary guardians, upon agreement of the parties, where the parents object to the entry of a permanent guardianship yet the parties agree that the child and parents are not yet ready for reunification.[35] To eliminate uncertainty and inconsistency, the MPC should be amended to permit courts to extend temporary guardianships to implement transition plans under §5-213, by agreement of the parties, or for other good cause. Alternatively, the language could be clarified to permit courts to issue Interim Orders in pending guardianship matters, much like the orders that District Court judges may enter in the full range of parental rights proceedings.

[34] There is a provision at 18-A M.R.S. §5-207(b) (proposed for §205(b)), which would be retained in the proposed changes, that the Probate Court shall make the appointment if, in addition to meeting the requirements in §5-204(b), "the best interest of the minor will be served by the appointment." It would be helpful to have such language in § 5-204 as well.

[35] For example, in the *Gabriel* case the Probate Court entered a Limited Guardianship Order to implement a transitional arrangement under §5-213 pursuant to the parties' agreement. *In re: Gabriel*, 2014 ME 104 ¶ 6. The Law Court nonetheless interpreted such order as another "temporary guardianship" entered after the expiration of the original temporary guardianship order. Courts and litigants attempting to fashion such orders would greatly benefit from more clarify and flexibility with respect to both temporary guardianships and transitional arrangements.

Additionally, the present language in the MPC, which the PATLAC recommends preserving, does not provide a sufficiently stringent notice requirement for temporary guardianships. The current law not only shortens the notice requirement to only 5 days prior to the hearing and does not require notice to anyone whose address or whereabouts are unknown, but also allows the court to waive notice on any person (other than the minor child if at least 14) *entirely* for "good cause." Given the substantial rights at stake in these cases and importance of providing notice to a parent before their rights are suspended, the MPC should follow the language in UPC §5-204(d) regarding notice and dispense with granting the court such broad discretion.[36]

Summary of Recommendations:

(a) Amend proposed §5-204 to clarify that the standard for appointment of a guardian over the objection of a parent must be demonstrated by clear and convincing evidence, that the appointment of the petitioner as guardian is in the child's best interests, and that the amendments to the MPC are not intended to reverse existing Maine law regarding the high standard to be met for such appointments.

(b) Amend MPC (either at §5-207 or new §5-204(d)) to provide Probate Courts more flexibility in making temporary guardianships and to impose the same notice requirements as for all other guardianship determinations.

3. Scope of Guardianship Order and Process for Review and Modification.

The MPC sets forth a few provisions regarding the scope and effect of guardianship orders. *See, e.g.*, 18-A M.R.S.A §§5-105, 5-204. The proposed language for §5-110 and §5-206 could be far clearer with respect to the scope of guardianships. A guardianship order that does not expressly reserve rights in the biological parents "effectively strip[s] the parents of their parental rights." *In re: Gabriel*, 2014 ME 104 ¶15. The MPC should provide courts with both clear authority and flexibility to craft guardianship orders that best serve a child's needs and interests in a particular situation by setting forth what specific rights are retained by parents whose rights are intact at the time of the guardian's appointment, including rights of contact, involvement in decision-making, and access to records and information about the child. The proposed language at §5-206 (based on the UPC) provides that court would need to find "good cause" in order to impose a limited, rather than unlimited, guardianship. Such language suggests that the "default" is that a parent retains *no* rights under the guardianship, which approach runs counter to policy objectives of family preservation and encouraging participation, to the maximum extent possible and appropriate, of both parents in a child's life. [37]

[36] The rationale in the comments for departing from the UPC's language on the procedure for temporary guardianships is that the MPC's approach "accommodates prompt disposition and appropriate protections for participants in the context of Maine's part-time Probate Courts." PATLAC Report at 574. The limitations of the present court structure should not drive the policy decisions regarding the due process requirements for these important matters.

[37] *Compare* 19-A M.R.S. §1653(2)(D)(4) (requiring all parental rights and responsibilities orders to include language granting both parents access to records and information regarding the minor child *unless* the court

Without specific language in a guardianship order setting the time, place, conditions, and frequency of parent-child contact, a parent has no basis to ask court to order a guardian to allow contact with his or her child. If an order is silent as to a parent's rights, the effect is to provide a guardian complete discretion regarding whether and if to allow any parent-child contact. Many guardians exercise such discretion reasonably, and facilitate and encourage visits between the parent and child to move the family towards reunification. However, if a guardian does not allow contact, a parent has no clear remedy. Indeed we have seen cases with blanket guardianship appointment orders where the parent was completely cut out of the child's life due to the actions of the guardian, causing lasting damage to the relationship.

I suspect that many Probate Courts issue these broad guardianship orders because there is nothing in the MPC to suggest that they can or should do otherwise. This is likely because, the MPC's guardianship law was originally based upon the testamentary appointment model (*i.e.* an "estate" matter rather than a "parental rights" matter), where there was no need to preserve a parent-child relationship. Rather, what is needed in such cases is a permanent arrangement to ensure that all of a child's needs will be met. There is, in such scenarios, no concern with preserving relationship or moving towards reunification. However, as discussed above, guardianships today frequently function as private child protection (or complex parental rights and responsibilities) cases; the guardianship provisions of the MPC should reflect such reality and provide the courts and litigants far more guidance about how best to meet children's needs and preserve families who are going through difficult times. Indeed, it is ironic that parents involved with guardianship matters, who as a group likely show *more* promise at being fit and capable parents in the future than do parents involved in child protection proceedings (which generally arise from serious allegations of abuse and neglect), have *fewer* guarantees under Maine law that they will be provided the opportunity to do so.

Therefore, the MPC should provide courts issuing guardianship orders with sufficient authority to set forth specific terms regarding parent-child contact, parental education, participation of the child and one or more of the parties in counseling, and other measures designed to preserve, support, and/or enhance the parent-child relationship, to ensure the safety and well-being of the children during the pendency of the guardianship, and to enable the family to move towards reunification.[38] The statute should require guardianship orders to spell out a guardian's powers (and the parents' corresponding retained rights). In addition, the MPC should include clear language permitting courts to modify guardianship orders to reflect any changed circumstances that arise while the order is in effect,[39] and to require periodic reviews of the guardianships to ensure that a guardian is fulfilling all of her obligations to the child and that the parents have been able to exercise their rights and to make adjustments to the order as necessary.

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specifically finds that such access in not in the child's best interests or would cause detriment to the other parent and states the reasons for such finding in the order).

[38] *Compare* 19-A M.R.S. §1653; 22 M.R.S. §4041(1-A).

[39] Such change was also recommended by Assistant Attorney General Janice Stuver in her comments to the Task Force on Kinship Families. (*See* http://www maine.gov/legis/opla/kinshipfamResponsesToInfoReq.pdf at 4).

The MPC should be amended to also require courts appointing guardians over the objections of one or both parents to include detailed findings setting forth the basis for such appointments. The Law Court has held that Probate Courts should issue detailed written findings in orders in contested guardianship matters. *Jewel II*, 2010 ME 80, ¶ 6, 2 A.3d 301; *Jewel I*, 2010 ME 17, ¶ 12, 989 A.2d 726; *Jeremiah T.*, 2009 ME 74 ¶ 27. However, not all Probate Courts follow this requirement, which can present difficulty both on appeal and in subsequent proceedings to modify or terminate guardianship orders.

I note that the November 2010 Report issued by the Maine Legislature's Task Force on Kinship Families include similar or identical recommendations for amendments to the MPC's guardianship provisions and to the procedures for such appointments. Report at 8.[40] One recommendation, to amend the Probate Court to allow "Transitional Arrangements For Minors," was enacted by the Legislature and now appears in section 5-213. The Task Force also concluded that kinship families would be "well-served" by: (1) guardianship orders that included terms of visitation with the child's parents or other persons; (2) guardianship orders that include findings or reasons for granting or modifying the guardianship; and (3) increased use of mediation prior to contested guardianship hearings. As PATLAC will recall, the Task Force recommended that it seek a report from PATLAC on these questions, and it did so through a November 3, 2010, letter to you. KFTF Report at 8; Appendix I. I do not know what PATLAC included in its response to this request, but, for the reasons set forth herein, the implementation of these suggestions would greatly improve the guardianship process.

Summary of Recommendation: Amend the MPC to provide guidance and authority to courts regarding the scope of guardianship orders and modifications thereto to enable them to best address the specific situation presented in each case and to require courts to provide detailed findings to support all initial or modified orders.

4. Termination of Guardianships.

The proposed changes to the MPC appear to make several changes to the provisions governing termination of guardianships, but it is not clear what substantive changes are being recommended and why. The language in proposed §5-112 seems to limit the ability of a parent to petition the court to terminate a guardianship, and it is unclear whether the language in proposed §5-210 regarding "any order" would include an order for termination. Under current Maine Law (per §5-212 and the Law Court in *In re Guardianship of David C.*, 2010 ME 136, ¶¶ 6–7 and *In re Guardianship of Jeremiah T.*, 2009 ME 74, ¶¶ 24–28), if the situation that gave rise to a guardianship (i.e. parental unfitness) has ended and one or more parents still have parental rights, such parents are entitled to petition the court to terminate the guardianship and to receive a presumption of fitness during such proceeding. *Jeremiah T.* at ¶28 ("The guardianship must be terminated unless the guardian proves that the mother is an unfit parent for the child and that continuation of the guardianship is in the child's best interests."). None of these requirements are reflected in the proposed amendments to the MPC. Indeed, there is no reference a ward's parents in the guardianship termination provisions in either the current or proposed MPC, which suggests

[40] The Report is available at: http://www.maine.gov/legis/opla/kinshiprpt.pdf.

that this provision as well is based upon a testamentary appointment model where the parents have no role in the proceedings after appointment.[41]

Moving the termination provision out of the child guardianship section to §5-112, as proposed in the PATLAC's report, may also cause confusion. The proposed language for §5-112 also does not preserve the right to counsel for indigent petitioning parents or guardians presently under §5-212(e) as well as the court's discretion to appoint an attorney for the ward under §5-212(c) or to "make any order that may be appropriate" as provided under §5-212. The simplest approach may be to consolidate §5-210 and §5-212, leave them in the child guardianship section, and amend such consolidated provision to expressly address the rights of petitioning parents.

Summary of Recommendation: Amend the proposal to retain the substantive provisions §5-212, revised to reflect the requirements set forth by the Law Court for review of petitions to terminate guardianships.

5. Termination of Parental Rights

There are several problems with adjudicating TPRs in the Probate Court, and I suggest that the language of §9-201 and §9-204 be reviewed for substantial changes, particularly to bring it more in line with the case law and to reflect the significant implications for the families involved with these cases. In particular, the PATLAC should consider whether to include specific language requiring reunification efforts (or waiver of the same) as prerequisite for a TPR hearing, as is the case in child protection cases under Title 22, as well as additional provisions incorporating other aspects of Maine's child protection law.

Summary of Recommendation: Undertake a comprehensive review of MPC provisions governing TPR proceedings accompanying adoptions.

6. Recording of Proceedings.

The Probate Courts do not generally record proceedings other than for TPR hearings. The MPC should be amended to require that all hearings and other proceedings in guardianship and TPR matters are recorded by the Court (whether Probate or District Court), as well as other proceedings upon request of one or more parties, all at no cost to the parties. Ideally, the MPC should include a provision to address when audio recordings are mandatory (such as in all proceedings in guardianship and TPR matters) and which proceedings are to be recorded upon action of the court or request of a party, similar to Administrative Order JB-12-A (A. 11-13) applicable in Maine Judicial Branch proceedings.

Summary of Recommendation: Amend MPC to require official recording of proceedings in guardianship, TPR, and other matters.

[41] The current MPC could be far clearer regarding termination of guardianships as §5-210 is titled "Termination of appointment of guardian; general" but refers only to automatic terminations or resignations of the guardian, whereas §5-212 is titled "Resignation or removal proceedings" and refers to petitions to terminate the guardianship. I agree with PATLAC's recommendation to consolidate all termination provisions in one section. Report at 551–54.

7. Law Practice by Probate Court Judges

The practice of law by Probate Judges causes practical problems and can lead to actual or apparent conflicts of interest (or, at the very least, it can be unsettling for the litigants and the other counsel). Such problems are compounded by the fact that there is only one Probate Judge in each county. The 1985 Cotter Report outlined the many serious implications of permitting Probate Judges to practice law part-time due to potential for actual conflicts as well as an overall "serious appearance of impropriety" it causes. The Committee stated in conclusion that the practice "should no longer be permitted to continue" (p. 4), and it recommended that the applicable Code of Judicial Conduct should be amended to "prohibit the practice of law by all judges, including Probate Judges," (p. 6). No modifications to the Probate Court system or ethical rules have been enacted in response to (or consistent with) those recommendations,[42] and the same problems documented in 1985 persist today.

Summary of Recommendation: Amend 4 M.R.S. §307, 18-A M.R.S.§1-303, and the Maine Judicial Canon Part II, Section B (1)(b) to prohibit the practice of law by Probate Judges.

8. Appointment of GALs

GAL can play an essential role in the parental rights cases described above. The proposed §5-115 concerning GALs removes the detailed language in the current statute with the stated aim of providing more "flexibility" and discretion "to tailor the role of the guardian ad litem to the circumstances." Report at 562–63. However, the proposed language does not set forth any clear standards or expectations for the court or for GALs, which could lead to inconsistent practices. If there is concern that any of the specific provisions of §5-115 do not provide courts with sufficient authority in GAL appointments, then the current language should be amended to address such concerns. Otherwise, the current statute should remain in place.

Summary of Recommendation: Retain current §5-115.

I would note as a final matter that, while I have limited my comments and recommendations to provisions of the MPC addressing parental rights, I am aware that many of problems outlined above (particularly with respect to inadequate resources, due process protections, and uniformity among court practices) arise in the context of other kinds of proceedings, particularly adult guardianship and conservatorship matters. I will leave it to those who practice more extensively in those areas to provide comments on how the MPC can best address such concerns.

Thank you again for the opportunity to submit these comments and suggestions. I would welcome the opportunity to discuss them further with the PATLAC and/or to provide additional information or more specific recommendations.

[42] The Maine Probate Judges Assembly adopted a "nonbinding resolution" in the 1990s "recommending" that probate judges not appear before other probate judges in contested matters (but permitting the judges' law partners to do so). Hon. James E. Mitchell, *Maine Probate Procedure* § 1442 (2012).

Sincerely,

Deirdre M. Smith
Professor of Law and
Director of the Cumberland Legal Aid Clinic

cc: Hon. Wayne Douglas, Chair, Family Law Advisory Commission

Public Comment: Report of the Family Division Task Force, 2013

J M Coll <[redacted]> Thu, Sep 11, 2014 at 11:53 AM
Reply-To: J & M Coll [redacted]
To: lawcourt.clerk@courts.maine.gov
Cc: Mary Ann Lynch <[redacted]>, [redacted], [redacted]

To: Matthew Pollack
Clerk Maine Supreme Judicial Court

Subject :Public Comment on Report of the Family Division Task Force, 2013.

This is an interesting report in which the growing 74% 'pro se' problem is acknowledged, but it seems to despair of a solution. Maybe in time... Maybe never... But ... we're thinking about it and working on it. It's just that the thought and work hasn't been successful in containing the growth of the problem, in designing an approach, much less, finding answers to the problem.

It is our impression that the current status quo, financial incentives to the "divorce bar", are mammoth! Seriously analyzing the 'pro se' problem, a serious legislative audit or serious problem solving might, God forbid, "kill the goose that laid the golden egg" for the "divorce bar"! After all, as quoted in the Family Division Task Force Report, 86% of family court cases have only ONE LAWYER!

Imagine that one lawyer (in the 86 % of cases) opposing a 'pro se' party. As work, it is a 'slam dunk'. Like ""taking candy from a baby". Very easy money. Two "champions" in the legal arena; one with a full armamentarium of legal weapons, knowledge of legal protocol and procedure - the other virtually naked and unarmed. Care to put a little money on the probability odds of winning? We're not saying that ALL 'pro se' parties lose, but the "odds"... Not even!

The 'pro se' party in cases we know of is totally frightened of the court, intimidated by the age old etiquette governing functioning in court.

Let's consider a few generic issues: Unreliable help from the court in serving papers and in compiling other necessary paper work. No full understanding of the Rules of Evidence, Rules of procedure, no knowledge of how to frame the case for presentation, no courtroom experience in examining witnesses, no techniques for dealing with almost constant barrage of, "I oppose" actions from the attorney for the other side. These are just a few (of many) items to consider. Then there is the matter of self-esteem and feeling unbelievably stupid in the alien legal culture of a family court (and this is doubly a problem for foreign litigants). Add to the 'pro se' nightmare the minimization of the problem (with good $$$ reason) by the bar and judges who vary greatly concerning: impatience, anger, put-downs, scoldings and kindness, patience and the very limited "help" from the bench that can be offered without challenges of impairing their "judicial impartiality", fairness, "due process". It is about 'pro se' FEAR, EMOTIONAL PAIN AND FEELING VICTIMIZED in our Maine Family Courts.

Sorry, but that's our reality check for readers of this document, and, remember, you asked for "public" comments. You might say that this is a 'pro se' comment. I'm not a lawyer and no lawyer shaped my expression of concerns!

The 'pro se' problem more than anything else demonstrates the extreme (and growing) breakdown of justice in Maine courts and the near shameless financial opportunity afforded any lawyer who opposes a 'pro se' litigant! No wonder the "divorce industry isn't rushing to correct the problem!

WE SUGGEST: We would suggest that the Court, the Governor, the Legislature submit a bill in January 2015 for an OPEGA Audit of 'pro se' in our Maine courts. Let OPEGA look at: the numbers of cases, the growth of the

‘pro se’ trends, the experiences and feelings of ‘pro se’ litigants, the outcomes of their cases, the public perception of attitudes of family court judges about ‘pro se’, judges recommendations for change.

We would also suggest that an audit consider the question of what value do family courts provide to those going through divorce and custody? Are family courts adding anything to the welfare of our Maine children and families?

Idealistically, we would imagine that these questions and others should be of interest to all three branches of Maine Government and to those involved in divorce and custody actions. It would answer the “problem vs no problem” debate with facts and evidence.

Jerome A Collins, MD

[redacted].

Kennebunkport, Maine 04046 Tel [redacted]

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September 12, 2014

Clerk of the Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine
04101-4125

RE: Family Division Task Force Final Report

Dear Clerk:

I am writing on behalf of Pine Tree Legal Assistance regarding some of the recommendations of the Family Division Task Force (FDTF) in their final report of May 30, 2014. Pine Tree Legal assists low income clients in family matter cases and prioritizes cases in which there are issues of domestic violence and sexual assault. In 2013, Pine Tree handled 768 family law cases, of which 533 (70%) involved domestic violence or sexual assault. In addition, the Volunteer Lawyers Project which is staffed by Pine Tree Legal Assistance coordinated pro bono legal assistance in 2,867 family law cases.

The FDTF's proposed amendment to Maine Rule of Civil Procedure 110 which proposes clarification of magistrate authority to conduct interim hearings *sua sponte* will be particularly important and helpful for low income primary residential parents and victims of domestic violence, and we strongly support this clarification. Similarly, changing the Case Management Conference notice to reflect that child support will be established at the initial court appearance will benefit these populations.

The current practice in some areas of not establishing child support at the first court appearance in the family matter case has led to significant negative impacts on low-income primary residential parents. For example, in one case, a victim of domestic violence and primary residential parent agreed to a $20 per week support order, a significant downward deviation from the guideline support of $180, at case management and then was precluded from addressing that issue again until the conclusion of the case, after her motion for expedited hearing was denied. In that case the magistrate indicated that the plaintiff should agree to the $20 order because otherwise there would be no support established.

Often, child support arrearages are not retroactively instituted in cases with low income litigants. This practice has disparately impacted low income primary care providers.

The proposed amendment related to family law magistrate authority to modify any provision of protection from abuse (PA) orders raises some concern. Although cognizant of the

need to balance efficiency with protections for victims of domestic violence, the imbalance of power that already exists within relationships involving domestic violence raises concerns about whether parties would be able to enter into agreements to modify PAs within this context, particularly if they are pro se or even represented by counsel not aware of all of the dynamics of domestic violence. In many areas, victims of domestic violence may have the benefit of both domestic violence advocates and/or counsel for protection from abuse proceedings but not during subsequent family matter cases.

Similarly, although the PA process is certainly not usually the appropriate place to address issues of ongoing parental rights and responsibilities, a requirement to initiate a family matters action could be dangerous, not in a victim's best interest, and could be cost-prohibitive to many low-income litigants. The current practice of addressing such requests on a case by case basis allows for important judicial discretion and should not be governed by a bright line requirement.

For example, sometimes a defendant violates an order during the exchange of a child or commits some subsequent act that necessitates a change in the PA. The plaintiff might then need to seek a modification of the conditions surrounding exchange, location of pick up and drop off, or the visit supervisor. These types of modifications should not subject the victim to a requirement to initiate the lengthy and expensive and potentially dangerous process of family matter litigation just to address a simple and potentially very important safety-related change. The purposes of the PA statute include expeditious resolution of matters related to abuse and a requirement to resolve any subsequent issue by initiating an entirely separate proceeding would be contrary to those purposes.

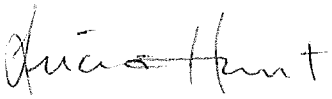
We support the idea of combined post-judgment motions for relief, as this would consolidate and expedite those motions.

We also support the idea of a single magistrate assigned to a case. Often the history of the case and other interactions during conferences with a magistrate inform interim hearings and would streamline presentations of issues and evidence.

We strongly support the idea of a mechanism to test whether post-judgment motions establish a prima facie showing of substantial change in circumstance. Occasionally, there are cases in which one party perpetuates abuse by filing repeated frivolous motions. A method to preserve judicial economy and protect families from the uncertainty of prolonged litigation would be helpful in that small subset of cases.

Thank you for the opportunity to comment and for considering our perspective on these matters.

Sincerely,



Lucia Chomeau Hunt, Bar No. 10025
Staff Attorney, Family Law Unit
Pine Tree Legal Assistance

Family Division Task Force Final report

Cynthia Martinez <[redacted]> Sun, Jul 27, 2014 at 12:42 PM
To: "lawcourt.clerk@courts.maine.gov" <lawcourt.clerk@courts.maine.gov>, [redacted]

To whom it may concern and Tracie Adamson:
My name is Cynthia Martinez-Edgar from Orono, Maine and I had met with Tracie Adamson and also spoke at the public hearing held in Bangor on January 8, 2014 in regards to the experience my family had with the Bangor family court process. I just read through the final report that is very extensive and thorough but I wanted to add a couple suggestions for you all to consider.

In the section relating to Attorney Fees I copy and pasted what was recommended:

7. Public comment was consistent that the cost of legal services can create an overwhelming burden on litigants. While the Task Force acknowledges that the court may find conflict in directly limiting attorney fees, the court should take a more active role in assessing attorney's fees as cases progress. If attorney fees are creating hardship for one or more of the parties, the scheduling order may be adjusted to move cases forward in a cost-sensitive manner.

If limiting attorneys fees is not possible then my suggestion is that the litigants and their lawyers have to give the Judge/Magistrate a copy of the current bill at every court appointment. Have that Judge keep a record of what each family is spending throughout their case. That may help guide the process in the sense that it clearly goes against a child/children's best interest if their parents are falling into economic hardship because of the court process. Having the actual dollar amount in front of the Judge and having that available to compare with what each newly single income family is earning and taking into account the cost to maintain a home and provide for a child may help clarify the economic reality for families that have to go through the court process. It is important for the Judge to get the full picture and know what each party is spending to have their case resolved.

In the section relating to Motions to Modify, I also copy and pasted what was recommended:

1. Motions to Modify
Establish some mechanism to test whether a party has established a prima facie showing of a "change of circumstance" prior to requiring the parties to fully litigate post-judgement motions to modify. Parties that file repetitive post-judgment motions subject the other party to the entire court process, including final hearing, just to reach the initial question of whether there has been a change of circumstance sufficient to warrant court action. This process puts an undue strain on party resources, leaves certain families in a constant state of uncertainty and unduly squanders precious court resources.

The Task Force is mindful that due process concerns must be balanced and may limit the court's ability to vet whether a change of circumstances constitutes a "substantial" change without the opportunity for a full hearing. However, the Task Force suggests that the current process is not working in those—even if rare—circumstances where the post- judgment process is

abused.

I would like to share a possible "mechanism" that may help with repetitive Motions to Modify. In my case Weiss vs. Martinez-Edgar where the Plaintiff took us back to court with a Motion to Modify very shortly after we had painfully and expensively come to a settlement, the Magistrate ordered a Guardian Ad Litem to our case. Through the process of working with the GAL we came up with an agreement that was designed to keep us from having to return to court over continued frivolous disputes. In our order it says, "If there are disputes between the parties, they shall engage in good faith efforts with Wayne Doane (the GAL) to resolve the disputes prior to the initiation of any further court proceedings." This step was meant to protect us from having to go back to court for every whim of the other parent.

In the section referring to Goals:
(8) To promote civility in divorce and other family law proceedings.

I believe that Judges/Magistrates and Lawyers are in positions of power that can promote and guide a bridging of differences for families disputing over children. The best interest for a child is minimal conflict and family law Lawyers who assist in promoting discord between families by pursuing false claims without any actual evidence provided by their client should be ordered to go through a similar program such as For Kids Sake that parents are ordered to attend. The focus should be how do we get this family with Shared Parental Rights and Responsibilities working together for the best interest of the child.

Thank you for your time and best of luck with your attempt at making the family court system work better for families and efficiently for the Courts.

Sincerely, Cynthia Martinez-Edgar
[redacted] Orono, ME 04473 [redacted]